

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN, GREEN BAY DIVISION

-----X
ENCAP, LLC.

:
Plaintiff, : CASE NO.
v. : JURY TRIAL DEMANDED

:
THE SCOTTS COMPANY, LLC,

:
THE SCOTTS MIRACLE-GRO COMPANY, LLC,

:
and

:
OMS INVESTMENTS, INC.,

:
Defendants

-----X

COMPLAINT

Plaintiff, ENCAP, LLC ("ENCAP") by and through counsel alleges and complains against Defendants, THE SCOTTS MIRACLE-GRO COMPANY, LLC, THE SCOTTS COMPANY, LLC, and OMS INVESTMENTS, INC. (collectively, "SCOTTS MIRACLE-GRO") as follows:

THE PARTIES

1. Plaintiff, ENCAP, LLC, is a company organized and existing under the laws of the State of Wisconsin, having a principal place of business at 3921 Algoma Road, Green Bay, WI 54311.

2. Upon information and belief, THE SCOTTS MIRACLE-GRO COMPANY, LLC, Defendant, is a company organized and existing under the laws of the

State of Ohio, having a principal place of business at 14111 Scotts Lawn Road, Marysville, OH 43041.

3. Upon information and belief, THE SCOTTS COMPANY, LLC, Defendant, is a company organized and existing under the laws of the State of Ohio, having a principal place of business at 14111 Scotts Lawn Road, Marysville, OH 43041.

4. Upon information and belief, OMS INVESTMENTS, INC., Defendant, is a company organized and existing under the laws of the State of Delaware, having a principal place of business at 10250 Constellation Blvd., Los Angeles, CA.

JURISDICTION AND VENUE

5. This is a civil action seeking damages, injunctive relief and attorney's fees for federal claims including patent infringement, and for state law claims including trade secret misappropriation and violation of a Confidentiality Agreement.

6. The jurisdiction of this Court over the federal claims is proper pursuant to 28 U.S.C. §1331 (federal question) and §1338 (patent). This Court has jurisdiction over the state law claims pursuant to 28 U.S.C. §1337 (supplemental), because they form part of the same case or controversy as the federal claims, and also pursuant to 28 U.S.C. §1332 (diversity), because the plaintiff is citizen of a different state than any of the defendants and the amount in controversy exceeds \$75,000. Venue is proper in this Court pursuant to 28 U.S.C. §1391 and §1400.

7. This Court has personal jurisdiction over SCOTTS MIRACLE-GRO due to its continuous and systematic business relating to its products in the state of

Wisconsin including the sale, offering for sale and/or advertisement of its products in Wisconsin.

8. The SCOTTS Company, LLC manufactures and sells "EZ Seed®" Products and "Turf Builder®" Grass Seed Products that infringe technology platform patents that ENCAP is asserting in this action. The Court has personal jurisdiction over the SCOTTS Company, LLC., because the SCOTTS Company, LLC. advertises, offers for sale and/or sells the infringing "EZ Seed®" Products and "Turf Builder®" Grass Seed Products in interstate commerce, including in the State of Wisconsin and in this District and continue to conduct this infringing activity in a continuous and systemic manner.

9. The SCOTTS Miracle-Gro Company, LLC manufactures and sells "EZ Seed®" Products and "Turf Builder®" Grass Seed Products that infringe technology platform patents that ENCAP is asserting in this action. The Court has personal jurisdiction over the SCOTTS Miracle-Gro Company, LLC., because the SCOTTS Miracle-Gro Company, LLC. advertises, offers for sale and/or sells the infringing "EZ Seed®" Products and "Turf Builder®" Grass Seed Products in interstate commerce, including in the State of Wisconsin and in this District and continue to conduct this infringing activity in a continuous and systemic manner.

10. OMS Investments, Inc. directs the manufacture, offer for sale, sale, and licensing of the "EZ Seed®" Products, and "Turf Builder®" Grass Seed Products that infringe technology platform patents that ENCAP is asserting in this action. This Court has personal jurisdiction over OMS Investments, Inc. because OMS Investments, Inc. directs the offer for sale and sale of the "EZ Seed®" Products, and "Turf Builder®"

Grass Seed Products, in interstate commerce, including in the state of Wisconsin and in this district and continue to conduct this infringing activity in a continuous and systemic manner.

BACKGROUND

11. U.S. Patent, 6,209,259 ("the '259 patent") was issued on April 3, 2001 from application Serial No. 09/113,254 filed on July 10, 1998, entitled SEEDING TREATMENTS. The patent for this platform technology is assigned to ENCAP, LLC through an assignment dated July 12, 2000 and recorded at the United States Patent and Trademark Office at Reel 011258, Frame 0827. A true and correct copy of the '259 patent is annexed hereto as Exhibit 1.

12. U.S. Patent 7,412,878 ("the '878 patent") was issued on August 19, 2008 from application Serial No. 10/841,204 filed on May 6, 2004, entitled WATERING INDICATOR. The patent for this platform technology is assigned to ENCAP, LLC through assignments dated May 6, 2004 and recorded at the United States Patent and Trademark Office at Reel 015313, Frame 0691. A true and correct copy of the '878 patent is annexed hereto as Exhibit 2.

13. U.S. Patent 6,745,513 ("the '513 patent") was issued on June 8, 2004 from application Serial No. 09/821,128 filed on March 29, 2001, entitled AGGLOMERATED MULCH CARRIER. The patent for this platform technology is assigned to ENCAP, LLC through assignments dated March 23, 2001 and recorded at the United States Patent and Trademark Office at Reel 011673, Frame 0105. A true and correct copy of the '513 patent is annexed hereto as Exhibit 3.

14. ENCAP has invented and patented many novel platform technologies in the seed, mulch, water management, soil conditioners and fertilizer industries. ENCAP has expended millions of dollars in research and development and legal costs to develop and protect these platform technologies. ENCAP is a marketer of products in the Consumer and Commercial Lawn and Garden Industry, selling seed, mulch, fertilizer (and combinations thereof), water management, soil conditioning and related products based on these platform technologies.

15. In early 2002, Personnel from The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC, including Directors of Marketing, Production Managers, Brand Managers, Research and Development, and the Manager of the "Patch Master®" Product Line had several introductory confidential communications with persons at ENCAP, prior to the Confidential Information Memorandum being sent to and received by The SCOTTS Company, LLC and SCOTTS Miracle-Gro, LLC, inquiring about ENCAP's platform technologies and whether they were protected by any patents. The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC were interested to know how the seed coating in ENCAP's encapsulated seed technology absorbed water.

16. Personnel from The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC stated to ENCAP at that time that they recognized the benefits of ENCAP's products and related platform technologies over the pelleted mulch products in reducing seed segregation. SCOTTS representatives further stated that they were interested in exploring the possibility of having a premium line of seed, mulch and fertilizer patch products. SCOTTS representatives also stated that ENCAP's Grass Repair

Kit is a patch type product that offers many advantages over the puffy-bag and pellet products at that time.

17. Shortly thereafter, ENCAP sent to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC at The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC request, cases of ENCAP's Grass Repair Kit, and ENCAP's Mulch and Encapsulated Seed Products that were representative of ENCAP's platform technology. The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC stated that they were going to test these products.

18. In June of 2002, ENCAP, through its agents, Transactive Partners, Ltd., sent to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC, a Confidential Information Memorandum. On the second page of the document, it was stated that the recipient of the Confidential Information Memorandum, The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC, agrees herein, in consideration for the receipt of this document, not to reproduce, copy, use or transmit this document or the data contained herein, in whole or part, or to suffer such action by others for any other purpose except with written permission of Transactive Partners Ltd.

19. The Confidential Information Memorandum stated that ENCAP had recently developed and protected innovative platform technologies in the horticultural and agricultural markets. ENCAP disclosed the problems and shortcomings related to the current product technologies offered at the time, and how ENCAP's platform technologies and products were developed to be a novel and innovative solution to them.

20. The Confidential Information Memorandum stated that in all cases, the platform technologies were intended to make life easier for both the consumer and the seed. SCOTTS MIRACLE-GRO called their current product, EZ Seed.

21. One such innovative platform technology discussed is the process that allows ENCAP to encapsulate individual seeds with the precise amount of nutrients, conditioners, and mulch required to enhance the seeds' ability to survive and thrive. The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC were told at this time that this technology was patented. (US Patent 6,209,259).

22. ENCAP further disclosed its mulch technologies, which combine various mulching agents, soil conditioners, watering indicators (part of a pending patent application owned by ENCAP), asymmetric, interlocking granules for use as a seed cover and/or seed carrier. (US Patent 6,745,513).

23. ENCAP disclosed to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC the ideas behind ENCAP's encapsulated seed platform technology, which included creating a protective moisture-absorbing blanket that is around each seed. The moisture-absorbing blanket enhances the germination and establishment process by absorbing and holding water around each seed. Water softens and swells the seed. The seed encapsulation absorbs/retains dramatically more moisture than normal, un-encapsulated turf seed. ENCAP's encapsulated seed was also shown by university studies to outperform the establishment of untreated seeds.

24. ENCAP also provided confidential information to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC regarding the use of the color of

the mulch as a watering indicator as taught in its platform technology. ENCAP disclosed to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC that watering practices by consumers require the help of watering platform technologies to help the consumer know when, and how long, to water. The mulch is a light color when dry and a dark color when wet.

25. ENCAP specifically referred to one of its watering platform technologies (Water-Me-Technology) as "THE SMART PRODUCT". This technology helps tell the consumer when watering is needed based on a visual color indicator to the consumer. Five years after ENCAP disclosed these concepts to SCOTTS MIRACLE-GRO, SCOTTS MIRACLE-GRO trademarked the name WATER SMART in association with their soil amendments, fertilizer, and grass seed products.

26. ENCAP also provided confidential information to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC regarding the use of a product that changes size to indicate when watering is needed. This watering indicator platform technology taught how a mulch product can be watered until a specific size change (increase) occurred.

27. It was specifically stated by ENCAP in the Confidential Information Memorandum to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC that the Encapsulated Seed platform technology was patented. It was also stated to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC that the Agglomerated Mulch Carrier platform technology was patent pending and that the Colored or Fragrance Horticultural/Agricultural platform technology was patent pending.

28. Transactive Partners received a signed a Confidentiality Agreement in June of 2002 on behalf of The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC prior to Transactive Partners disclosing any of its confidential information to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC on ENCAP's behalf.

29. In 2006, Wisconsin Governor Jim Doyle honored ENCAP with the Governor's Small Business Technology Transfer Award for outstanding achievement moving a technological innovation from idea to commercialization. The award acknowledges ENCAP's unique technology platforms and innovation advancement business model and its successful results. In November 2006, the Green Bay Chamber of Commerce awarded ENCAP its High Technology Manufacturer of the Year Award recognizing ENCAP for its innovative technology platforms. In 2007, ENCAP was named number 110 in Inc. Magazine's prestigious "Inc. 500 list," which charts America's fastest growing privately held companies based, on sales growth of ENCAP's platform technology products.

30. During the initial discussions between The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC and ENCAP in 2002, ENCAP provided its Grass Repair Kit to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC. The Grass Repair Kit included mulch and seed in combination. SCOTTS currently is selling the "Patchmaster®" Lawn Repair Mix and Evergreen Lawn Repair Kit. Sellers and

distributors of the SCOTTS Patchmaster Lawn Repair Mix and Evergreen Lawn Repair Kit products have been referring to this product as a "Repair Kit", which is a trademark of ENCAP.

31. ENCAP is known and recognized by Lawn and Garden industry leaders for its innovative expertise and problem solving abilities.

FIRST CAUSE OF ACTION (PATENT INFRINGEMENT)

32. Plaintiff, ENCAP hereby incorporates paragraphs 1-31 as if fully set forth herein.

33. SCOTTS MIRACLE-GRO has been, is, and will continue infringing ENCAP's '513 patent through its unauthorized manufacture, use, offers for sale and sales of its "EZ Seed®" products and Miracle-Gro "Patch Magic" products and threatens to, and will continue to, infringe the '513 patent, causing ENCAP great and irreparable injury and damage unless enjoined by this Court, said infringement being without consent of ENCAP.

34. SCOTTS MIRACLE-GRO's actions constitute a deliberate and willful infringement of U.S. Patent 6,745,513 and will continue unless enjoined by this Court.

35. ENCAP has worked to improve and has improved the seed, mulch and fertilizer industry by designing, manufacturing and distributing innovative products and patenting the related platform technologies which help the environment with the use of an agglomerated/granulated mulch product as a seed carrier that is produced by an agglomeration technology. The mulch agglomerates used as a carrier for the seeds reduces segregation (unmixing) tendencies of seeds from the carrier product.

SECOND CAUSE OF ACTION (PATENT INFRINGEMENT)

36. Plaintiff, ENCAP hereby incorporates paragraphs 1-35 as if fully set forth herein.

37. SCOTTS MIRACLE-GRO has been, is, and will continue infringing ENCAP's '878 patent through its unauthorized manufacture, use, offers for sale and sales of its "EZ Seed®" products and Miracle-Gro "Patch Magic" products and threatens to, and will continue to, infringe the '878 patent, causing ENCAP great and irreparable injury and damage unless enjoined by this Court, said infringement being without consent of ENCAP.

38. SCOTTS MIRACLE GRO's actions constitute a deliberate and willful infringement of U.S. Patent 7,412,878 and will continue unless enjoined by this Court.

39. ENCAP has worked to improve and has improved the seed, mulch and fertilizer industry by designing, manufacturing and distributing products which help the environment with the use of water absorbing/releasing materials (Indicators) to serve as the visual indicators for people to know when they are to start and stop watering their lawn.

THIRD CAUSE OF ACTION (PATENT INFRINGEMENT)

40. Plaintiff, ENCAP hereby incorporates paragraphs 1-39 as if fully set forth herein.

41. SCOTTS MIRACLE-GRO has been, is, and will continue infringing ENCAP's '259 patent through its unauthorized manufacture, use, offers for sale and sales of its Turf Builder® Grass Seed Products and threatens to, and will continue to

infringe the '259 patent, causing ENCAP great and irreparable injury and damage unless enjoined by this Court, said infringement being without consent of ENCAP.

42. SCOTTS MIRACLE-GRO's actions constitute a deliberate and willful infringement of U.S. Patent 6,209,259 and will continue unless enjoined by this Court.

43. ENCAP has worked to improve and has improved the seed, mulch and fertilizer industry by designing, manufacturing and distributing products which help the environment, by enhancing the control of moisture about the seed and thereby to assist in seed germination, release of plant nutrients into the soil, and in stabilizing moisture content in soil on which the encapsulated seed is placed.

FOURTH CAUSE OF ACTION
(MISAPPROPRIATION OF TRADE SECRETS)

44. Plaintiff, ENCAP hereby incorporates paragraphs 1-43 as if fully set forth herein.

45. ENCAP took reasonable efforts to maintain the Confidential Information described in the Confidential Information Memorandum and in conversations with The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC as a trade secret.

46. The information provided in the Confidential Information Memorandum and related conversations with The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC regarding the encapsulated seed, mulch and watering technologies was not generally known to the public.

47. The information provided in the Confidential Information Memorandum and related conversations with The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC regarding the encapsulated seed, mulch and watering technologies conferred an economic benefit to ENCAP.

48. SCOTTS MIRACLE-GRO never had permission to use any of the information that was provided to it by ENCAP through Transactive Partners.

49. Nearly seven years after The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC received ENCAP's confidential and trade secret information, SCOTTS MIRACLE-GRO came out with its "EZ Seed®" Products, Miracle-Gro "Patch Magic" Products and "Turf Builder®" Grass Seed Products which upon information and belief use information which was provided to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC under confidentiality from ENCAP.

50. The last communication from The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC to ENCAP was on September 30, 2002 when The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC told ENCAP they were running test plots and then they would do consumer testing.

51. In 2009, SCOTTS MIRACLE-GRO began selling its "Turf Builder®" Grass Seed with Water Smart Technology. Upon information and belief, and after a reasonable investigation, SCOTTS Water Smart Technology is the same or highly similar technology that ENCAP disclosed to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC under confidentiality. Specifically, SCOTTS MIRACLE-GRO encapsulated their best seed in an absorbent coating that helps the seed to stay moist

and germinate faster than uncoated seeds. SCOTTS MIRACLE-GRO stated in their literature that 50% of grass seed users told them that they were not successful at growing grass because they didn't water frequently enough. SCOTTS MIRACLE-GRO stated that they listened to their consumers and came up with a solution. They wrapped their best seed in a super absorbing coating that helps seed to stay moist and germinate faster than uncoated seed. In reality, SCOTTS MIRACLE-GRO misappropriated this solution from ENCAP's confidential technology.

52. The Chief Financial Officer of SCOTTS MIRACLE-GRO, Dave Evans, stated at Oppenheimer's Ninth Annual Conference that the Turf Builder® Grass Seed with Water Smart Technology was "game changing innovation".

53. SCOTTS MIRACLE-GRO calls their SCOTTS Turf Builder® Grass Seed product "revolutionary".

54. In the 2010 SCOTTS MIRACLE-GRO Annual Report, it states the introduction of EZ SEED® marked SCOTTS MIRACLE-GRO's most successful new product launch ever.

55. SCOTTS MIRACLE-GRO misappropriated ENCAP's trade secrets under Wisconsin's Uniform Trade Secret Act, Wis. Stats. §134.90 that were in the Confidential Information Memorandum and disclosed to The SCOTTS Company, LLC and SCOTTS Miracle-Gro Company, LLC through conversations with Transactive Partners Ltd.

56. SCOTTS MIRACLE-GRO was unjustly enriched by using ENCAP's trade secrets and ENCAP is entitled to all of SCOTTS MIRACLE-GRO's profits from its use of the trade secrets.

WHEREFORE, ENCAP prays for the following relief:

- A. That United States Patents 6,745,513, 7,412,878, and 6,209,259 be adjudged valid and enforceable;
- B. That SCOTTS MIRACLE-GRO be adjudged to have infringed United States Patents 6,745,513, 7,412,878, and 6,209,259 ;
- C. That SCOTTS MIRACLE-GRO's acts of infringement be adjudged to be willful and deliberate;
- D. That SCOTTS MIRACLE-GRO, its officers, agents, servants, employees and attorneys and any and all persons in active concert or participation with them be preliminarily and permanently enjoined and restrained from infringing United States Patents 6,745,513, 7,412,878, and 6,209,259, including but not limited to by making, using, offering for sale and selling "EZ Seed®" Products, Miracle-Gro "Patch Magic" products and "Turf Builder®" Grass Seed Products;
- E. That SCOTTS MIRACLE-GRO be ordered to account for and pay to ENCAP the damage sustained by ENCAP due to SCOTTS MIRACLE-GRO's infringement of United States Patents 6,745,513, 7,412,878, and 6,209,259;
- F. That SCOTTS MIRACLE-GRO be ordered to pay pre-judgment and post-judgment interest on the damages awarded against it;

G. That SCOTTS MIRACLE-GRO be ordered to account for and pay to ENCAP any profits or royalties for any convoyed sales of products;

H. That ENCAP be awarded its costs and attorney's fees pursuant to 35 U.S.C. §285;

I. An Order directing SCOTTS MIRACLE-GRO to deliver up to the Court for disposition all product and all advertising and promotional materials that are in violation of ENCAP's rights;

J. An award to ENCAP of SCOTTS MIRACLE-GRO's profits and ENCAP's damages;

K. A trebling of the damages and profits awarded to ENCAP on account of SCOTTS MIRACLE-GRO's willful infringement of ENCAP's patents;

L. An award to ENCAP of such punitive damages as are appropriate in view of the willful conduct on the part of SCOTTS MIRACLE-GRO;

M. That ENCAP be adjudged to have trade secrets;

N. That SCOTTS MIRACLE-GRO be found to have misappropriated ENCAP's trade secrets;

O. An award to ENCAP for unjust enrichment for SCOTTS MIRACLE-GRO's use of ENCAP's trade secrets;

P. That SCOTTS MIRACLE-GRO's misappropriation of trade secrets be found to be willful and malicious and that ENCAP be awarded punitive damages in an amount not exceeding twice any compensatory award received by ENCAP for that misappropriation;

Q. An award to ENCAP of its costs in this action including its reasonable attorneys fees; and

R. Such other and further relief as the Court may deem just and equitable under the circumstances herein.

Dated this 18th day of July, 2011.

Respectfully submitted,

s/T. Wickham Schmidt

T. Wickham Schmidt, State Bar No. 1062002
Liebmann, Conway, Olejniczak & Jerry, S.C.
Attorneys and Counselors at Law
231 South Adams Street
Green Bay, WI 54305-3200
TELEPHONE: (920) 437-0476
FACSIMILE: (920) 437-2868

Philip M. Weiss (PW 4505)
WEISS & WEISS
300 Old Country Road, Suite 251
Mineola, NY 11501
TELEPHONE: (516) 739-1500

Aaron Olejniczak, State Bar No. 1034997
Andrus, Sceales, Starke & Sawall, LLP
100 East Wisconsin Ave, Suite 1100
Milwaukee, WI 53202
TELEPHONE: (414) 271-7590
FACSIMILE: (414) 271-5770

Attorneys for Plaintiff

(071109.101-#1028710)